BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KRYSTLE E. HUNTER Claimant	)	
VS.	)	
ICON HEALTH & FITNESS, INC. Respondent	)	Docket No. 267,314
AND	)	
LEGION INSURANCE COMPANY Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the August 1, 2005, Award by Administrative Law Judge Kenneth J. Hursh. The Director appointed E.L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of Board Member Julie A. N. Sample. The Board heard oral argument on November 1, 2005.

APPEARANCES

Clark H. Davis, of Olathe, Kansas, appeared for the claimant. Mark E. Kolich, of Lenexa, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. During oral argument to the Board, the parties agreed that respondent paid claimant at least 90 percent of her average weekly wage during the time she continued working for respondent after her accident. The parties further agreed that respondent continued to pay its share of the additional compensation items up until the date of claimant's termination. Accordingly, claimant's permanent partial disability compensation would be limited to her percentage of functional impairment for the period of time she worked for respondent after her date of accident. Although the average weekly wage would not include the additional compensation items, the permanent partial disability

compensation rate would not change because even claimant's base wage entitled her to the maximum weekly benefit.

ISSUES

The Administrative Law Judge (ALJ) found that claimant did not prove the amount of fringe benefits paid by respondent nor by any of her post-accident employers. The ALJ noted that since the stipulated average weekly wage (AWW) of $752.25 is sufficient for the maximum compensation rate, the fringe benefits are only relevant in determining the percentage of wage loss. The ALJ opined that a comparison of base wages claimant earned pre- and post-accident would yield substantially the same percentage results as a comparison of the actual base wages plus fringe benefits and, therefore, found that for purposes of the award, claimant's AWW was $752.25.

The ALJ concluded that the ratings of both Dr. Edward Prostic and Dr. Jeffrey MacMillan were credible as to claimant's permanent functional impairment and, therefore, averaged their ratings and found claimant had an 8.5 percent whole person impairment.

The ALJ also found that claimant's post-injury earnings were less than 90 percent of her AWW and, therefore, she was entitled to work disability. The ALJ noted that Dr. MacMillan reviewed a task list prepared by Michael Dreiling and opined that claimant's task loss was 33 percent. Dr. MacMillan also reviewed a task list prepared by Terry Cordray and opined that claimant's task loss was 12 percent. The ALJ found no flaw in either list of tasks and considered Dr. MacMillan's testimony to be that claimant had a task loss of 22.5 percent, which is an average of his two task loss opinions. The ALJ also noted that Dr. Prostic testified that claimant had a 58 percent task loss. The ALJ found that since the opinions of both Dr. Prostic and Dr. MacMillan were not shown to have any particular flaws or merit, both were equally persuasive. Accordingly, the ALJ determined that claimant's task loss was an average of the opinions of both Dr. Prostic and Dr. MacMillan, or 40.25 percent.

Concerning claimant's wage loss, the ALJ found that in 2002, claimant had a 33 percent wage loss; in 2003, claimant had a 47 percent wage loss; and in 2004, claimant had a 59 percent wage loss. For 2005 and continuing, the ALJ found claimant had a 49 percent wage loss. In awarding permanent partial disability, the ALJ averaged claimant's 40.25 percent task loss with each of these respective annual average wage loss percentages to arrive at a percentage of work disability for each of these annual time periods.

Respondent, in its Application for Review by Workers Compensation Appeals Board, requested review of "[a]ll findings and decision[s] contained in [the August 1, 2005,] award." However, in its brief and during oral argument to the Board, respondent only addressed the nature and extent of claimant's disability. Respondent stated that it did not dispute claimant's entitlement to a work disability award but takes issue with the ALJ's

determinations of task and wage losses. Respondent argues that Dr. Prostic's testimony only supports a finding of a 21 percent task loss. Respondent requests that the 21 percent task loss be averaged with Dr. MacMillan's averaged task loss opinion of 22.5 percent for a task loss of 21.75 percent. Respondent also argues that claimant either voluntarily quit or was terminated for lack of production from her post-accident job at Sprint and that it is clear the job at Sprint was within claimant's restrictions. Respondent requests, therefore, that claimant's wage at Sprint of $11.50 per hour be imputed to claimant, presumably beginning the date she was terminated by Sprint, which would result in a wage loss of 37 percent. An average of a 21.75 percent task loss and a 37 percent wage loss calculates to a work disability of 29.4 percent. Respondent made no argument in its brief nor at oral argument to the Board concerning the ALJ's finding of an 8.5 percent functional disability.

Claimant argues that the value of the employer's contribution to her fringe benefits should be included in her average weekly wage for purposes of comparing to her actual post injury earnings after leaving her employment with respondent, but otherwise requests that the award of the ALJ be affirmed. Concerning her wage loss, claimant also contends it would be improper to impute the wage she earned at Sprint to reduce her actual wage loss because she did not quit. Rather, she was laid off. Furthermore, her job at Sprint presented unique challenges that she could not continue performing physically. Claimant states that since her termination from respondent, she has made a good faith effort to find appropriate employment and, in fact, has been continuously employed in multiple employments. Therefore, she has complied with both the letter and spirit of the Workers Compensation Act. Claimant further argues that to impute the wage from Sprint would punish her for being motivated and hard-working. Concerning task loss, claimant states that although Mr. Cordray reviewed claimant's pre-injury jobs and opined that none of them required claimant to stand continuously for over 40 minutes or sit continuously for over 50 minutes, his opinion was not based on information supplied to him by either the claimant or any of claimant's prior employers. Claimant also states that by averaging the task loss percentages of Dr. Prostic and Dr. MacMillan, no undue weight was placed on the testimony of either physician.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was injured May 15, 2001, while working as a manager for respondent, a business that sold health and fitness products. Claimant was doing inventory, and while moving a 200 to 250-pound box, she heard a loud pop and had immediate pain in her back that made her fall to her knees. Claimant was first seen by Dr. F. Daniel Koch and then was referred to Dr. MacMillan for treatment. Claimant testified that she was taken off work for three days immediately after the accident and missed about 14 days total as a result

of the injury. She used her sick leave and vacation leave to cover these absences. No temporary total disability compensation was paid nor has any been requested.

Claimant last worked for respondent on January 3, 2002, when respondent closed the store she managed. At the time, claimant was working in a light duty capacity. Claimant testified she talked to respondent about staying with them in some capacity after the store closed, but she was told it had no light duty jobs available. When asked about fringe benefits, claimant testified she thought respondent contributed approximately $50 a week for health insurance and $12.50 a week for dental coverage. K.A.R. 51-3-8(c) provides: "The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in proper form to answer any questions that might arise as to the average weekly wage." In this case, respondent did not admit to a value for the additional compensation items, did not present a gross average weekly wage figure to the ALJ that included the fringe benefits and did not provide that wage information to claimant's counsel or the ALJ. Thus, claimant's testimony is the only evidence in the record. Although it is only an estimate, it is not contradicted and the amounts are not unreasonable on their faces. The Board finds these amounts should be included in claimant's pre-injury average weekly wage. Claimant said respondent also matched her investment of four percent of her salary and commissions in a 401(K) plan. However, she testified she was not vested when she was terminated by respondent so she did not get the benefit of respondent's contribution to her 401(K) plan. Adding $50 and $12.50 to $752.25 yields a gross pre-injury average weekly wage of $814.75.

While claimant was working for respondent, she also worked part-time for Borders book store. After respondent's store closed, she went to work at Borders full-time, earning $6.75 per hour until she started working at Sprint on or about March 15, 2002. Claimant was paid $11.50 per hour while working at Sprint. She testified that the job at Sprint hurt her back and that it was a stressful job. Claimant testified that with the constant pain in her back adding to the stress, she got run down, came down with mononucleosis and was off work for three months. After returning from her medical leave, she lost her job at Sprint because of her inability to meet her sales quotas. She went on unemployment for six months, during which time she went to work part-time for Long Motor Corporation (Long Motor). Claimant also went to work as a certified nurse assistant for Aberdeen Village, a nursing care home, for three eight-hour days a week, earning $10.50 per hour while she continued to work at Long Motors two evenings a week, or approximately nine hours. Claimant worked at Aberdeen for three months and left because she could not work fast enough and did not agree with their treatment of the residents. When she left Aberdeen, she went back to working 20 hours a week at Long Motor. A month later, she went to work for Kansas City Home Health Care and worked there for about six months. She worked 12-hour shifts and was being paid $11.50 per hour. She left this position because of a disagreement about health insurance. She then went to work at Long Motor full-time, making $9.50 an hour. She stated it was supposed to be a 40-hour per week job but she averages about 27 hours per week. Unfortunately, the record is not clear about the actual starting and ending dates for most of claimant's post-injury jobs, nor are the actual weekly

earnings set out with the requisite specificity to accurately compute the post-accident wage loss. This is apparently why the ALJ chose to use annual earnings based on the claimant's tax returns. Due to the incomplete record, the Board finds that it will likewise have to adopt that approach.

Dr. MacMillan, who is board certified in orthopedic surgery, first saw claimant on January 21, 2003, as her authorized treating physician. Dr. MacMillian diagnosed her with a degenerative disk disease at L5-S1 and recommended anti-inflammatory and pain medication and a TENS unit. Dr. MacMillan continued to treat claimant until August 19, 2003, when he concluded she had reached maximum medical improvement. He testified that claimant continued to use a TENS unit and was taking numerous medications, some which were prescribed by Dr. MacMillan and some prescribed by her personal physician. His final diagnosis was degenerative disk at L5-S1 and chronic fatigue syndrome. He testified the chronic fatigue syndrome could be related to a case of mononucleosis claimant previously had but was definitely not related to her back condition.

Using the AMA *Guides*[1], Dr. MacMillan opined that as a result of the work-related injury, claimant had a 5 percent permanent partial disability to the body as a whole using the diagnosis related estimate (DRE) lumbosacral Category II. He also recommended that claimant should limit her work to the sedentary level and restricted her lifting or carrying to 10 pounds or less on an occasional basis, lifting and carrying of negligible weight frequently, and standing and walking on an occasional basis.

Dr. MacMillan viewed a task list prepared by Mr. Cordray and opined that out of the 43 total tasks listed, claimant could still perform all but 5 tasks, which computes to a task loss of 12 percent. However, on two of those five tasks he questioned the accuracy of the job description. Dr. MacMillan also reviewed a task list prepared by Mr. Dreiling, and of the 24 tasks listed, he felt that 8 of the tasks exceeded claimant's current restrictions, which computes to a task loss of 33 percent. Likewise, off those eight tasks, Dr. MacMillan again questioned the accuracy of one of the job descriptions. He did not question the accuracy of the task descriptions that he said claimant could still perform.

Dr. Prostic is a board certified orthopedic surgeon who saw claimant on two occasions, both at the request of claimant's attorney. His first examination of claimant was performed on December 17, 2001. He found she had a central and slightly right-sided disk protrusion at L5-S1 with questionable pressure on the S1 nerve root. Dr. Prostic ordered x-rays of claimant's low back, which showed disk space narrowing at L5-S1 and a small traction osteophyte at L4-5. After examining claimant and reviewing her diagnostic tests, Dr. Prostic determined that claimant had a 12 percent permanent partial impairment to the body as a whole, using a compromise of the range of motion model and the DRE model

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[1]American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

of the AMA *Guides*, all of which he attributed to the May 15, 2001 accident. Dr. Prostic again examined claimant on February 21, 2005. His diagnosis of claimant had not changed and he recommended continuation of conservative treatment of her back. He also concluded that his previous disability rating of 12 percent to the body as a whole had not changed.

The ALJ averaged Dr. Prostic's 12 percent impairment opinion with Dr. MacMillan's 5 percent to find an 8.5 percent permanent impairment of function. The parties did not dispute this finding on appeal. Accordingly, the Board will affirm the ALJ and find claimant has an 8.5 percent functional impairment.

Dr. Prostic recommended restrictions, including lifting no more than 30 pounds occasionally and 10 pounds frequently and avoiding frequent bending or lifting at the waist, forceful pushing or pulling, no more than minimal use of vibrating equipment and captive positioning. Based on these restrictions, Dr. Prostic reviewed a list of tasks prepared by Mr. Dreiling and testified that claimant was unable to perform 14 of the 24 tasks for a 58 percent task loss. However, Dr. Prostic testified that with accommodations, claimant could perform 9 of those 14 tasks he had marked as not being able to perform. Those nine tasks all involved constant or prolonged sitting or standing and thereby violated Dr. Prostic's restriction against captive positioning. Also, Dr. Prostic left two of the 24 tasks unmarked, saying they were too ambiguous for him to provide an answer. As for the nine tasks he eliminated, Dr. Prostic assumed prolonged or constant sitting and standing meant 40 or 50 minutes out of an hour, whereas Mr. Dreiling utilized a definition of constant as two-thirds or more of the time and defined frequent as activity from one-third to two-thirds of the time. Dr. Prostic acknowledged that he did not know whether claimant could change positions, move around or stretch while performing those tasks. Accordingly, respondent argues that Dr. Prostic's opinion is speculative and should not be considered as to those nine tasks. It does appear from his testimony that Dr. Prostic backed away from his original opinion.

> Q. Okay. And so your report with regard to restrictions talks about captive positioning, and I think on direct examination you described that, or defined that as prolonged sitting or standing; is that true?
>
> A. Yes.
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> Q. And with regards to the word prolonged, how do you define that?
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> A. For standing more than 40 minutes an hour; for sitting more than 50 minutes an hour.
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> Q. And do you know, based upon these descriptions of either captive sitting or standing, whether or not it is more than 40 or 50 minutes an hour?

A. Well, I assumed it was constant rather than intermittent, so that's why I answered previously, without accommodations she wouldn't be able to do some of these tasks. So if she's allowed to change position to tolerance, then she could do this task.

Q. Okay. Now, I note, Doctor, that at the bottom of these individual sheets that Mr. Dreiling prepared, constant is actually defined as an activity or condition that exists two-thirds or more of the time. So if you apply two-thirds of the time to an hour, you are looking at less than 40 or 50 minutes; right?

A. Well, the question is whether it's two-thirds or whether it's really constant.

Q. Right.

A. Since I don't know, I erred on the side of caution. But if she is accommodated and allowed to change position to comfort, then she can do this.

Q. And you don't know one way or the other whether she can get up and stretch, move around? You don't know, do you?

A. That's correct.

Q. So your answers with regard to whether or not she can do these particular tasks that involve either constant standing or sitting is speculative?

A. Well, the nine of these that I have said no to because it is listed as constant sitting or standing, so for each of those nine, if she's permitted to change position to tolerance, she can do each of those.[2]

As a result, the Board finds Dr. Prostic eliminated 5 of the 24 tasks, not 14. This results in a task loss of 21 percent.

The Board finds that for purposes of this award, claimant's task loss is an average of Dr. Prostic's task loss of 21 percent and the average of Dr. MacMillan's two task loss ratings, 22.5 percent, for a task loss of 22 percent.

Michael Dreiling is a vocational consultant who met with claimant on March 15, 2005, at the request of claimant's attorney. In his meeting with claimant, Mr. Dreiling prepared a task list of 24 tasks describing the work tasks claimant performed over the 15 years before her work-related accident. Mr. Dreiling testified that claimant was working for Long Motor in a sedentary job at the time he visited with her, making $9.50 per hour. He said that Long Motor accommodated claimant's condition by allowing her to take breaks when she has pain and to take time off work, as long as she provides them with an excuse

[2]Prostic Depo. at 16-18.

slip from a doctor. Mr. Dreiling testified that it is unusual for an employer to treat an employee like that and that if claimant lost this job, it would be hard for her to go into the open labor market and find a like employer. Although Mr. Dreiling knew claimant worked other jobs after leaving respondent and before starting full-time at Long Motor, he did not go into detail with her about those other jobs and did not know how much she earned at those intervening jobs. Mr. Dreiling indicated that claimant earned fringe benefits that included health insurance and a 401(K) plan at Long Motor but did not know the value of the employer contributions for those benefits.

Another vocational rehabilitation counselor, Terry Cordray, met with claimant at the request of respondent on May 18, 2005. Claimant provided him with information concerning her jobs for the 15 years before her work-related injury, and he prepared a task list containing 43 job tasks claimant had performed.

Mr. Cordray testified that at the time he met with claimant, she was currently making $9.50 per hour and working a 40-hour week at Long Motor. Before she worked at Long Motor, she had worked for Sprint and earned $11.50 per hour doing outbound sales and was terminated for lack of production. Mr. Cordray testified that claimant is capable of earning more than $9.50 an hour, taking into consideration that she went to college for two years at a community college and two years at the University of California at Los Angeles, although she did not get a bachelor's degree, she has experience as a supervisor and manager of retail stores and has been an administrative assistant, a business owner and a licensed insurance agent. Mr. Cordray testified that at a minimum, claimant is capable of earning $11.50 per hour.

The ALJ determined claimant was entitled to a work disability. The permanent partial general bodily disability, or what is also known as "work disability," is defined at K.S.A. 44-510e and provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of

> the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[3] and *Copeland*[4] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in the K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual wages being received when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[5]

The Court of Appeals in *Watson*[6] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[7]

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 877 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group,Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *Id.* at 320.

[6] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[7] *Id.* at Syl. ¶ 4.

In this case, the Board agrees with the ALJ and finds that claimant made a good faith effort to find appropriate employment post accident. The Board further finds that claimant made a good faith effort to perform her job at Sprint. Accordingly, the wages she earned at Sprint will not be imputed to claimant for the period of time after she was terminated. Instead, the Board will utilize claimant's actual post-accident earnings to determine her wage loss. Due to incomplete records concerning the dates claimant worked at the various post-accident employers and the wages she earned at each, the Board will follow the ALJ's approach and utilize the claimant's annual incomes post accident to compute her wage loss. The Board will include the value of the additional compensation claimant testified about to recompute her pre-injury average weekly wage. Utilizing the average weekly wage of $814.75 yields a wage loss of 38 percent in 2002, 48 percent in 2003 and 52 percent in 2004.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated August 1, 2005, is modified as follows:

Claimant is entitled 153.55 weeks of permanent partial disability compensation at the rate of $401 per week to be paid as follows: 33.29 weeks of permanent partial disability compensation from May 15, 2001, at the rate of $401 per week or $13,349.29 for a 8.5% functional disability, followed by 51.71 weeks of permanent partial disability compensation from January 4, 2002, at the rate of $401 per week or $20,735.71 for a 30% work disability, followed by 52.14 weeks of permanent partial disability compensation from January 1, 2003, at the rate of $401 per week or $20,908.14 for a 35% work disability, followed by 16.41 weeks of permanent partial disability compensation from January 1, 2004,[8] at the rate of $401 per week or $6,580.41 for a 37% work disability, making a total award of $61,573.55, which is due and ordered paid in one lump sum less amounts previously paid.

The Board adopts the other orders of the ALJ as set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

[8]The Award pays out on April 24, 2004.

Dated this _____ day of November, 2005.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Clark H. Davis, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director